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Dispute Settlement in the Public Sector : The Canadian Scene
Le règlement des différends dans le secteur public canadien

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Résumé de l'article

Les employés de tous les niveaux de gouvernements ainsi que des services parapublics tels les hôpitaux et les écoles bénéficient au Canada de droits plus étendus à la négociation collective qu'aux États-Unis. Le contraste est particulièrement marqué en ce qui a trait au règlement des différends alors qu'une portion importante et grandissante d'employés de services publics au Canada bénéficient d'un droit à la grève reconnu par la loi.

LA LÉGISLATION DU TRAVAIL ET LE SECTEUR PUBLIC

Les employés municipaux autres que les policiers et pompiers ont depuis plusieurs années été régis par les mêmes lois provinciales du travail que les ouvriers du secteur privé ; ceci leur a donné un droit de grève sans restriction. Les syndicats de policiers et pompiers, sauf quelques exceptions, ont accepté l'arbitrage obligatoire en vertu de leur propre constitution ou ils se le firent imposer par la loi. Alors que certaines provinces imposent l'arbitrage obligatoire plutôt que d'accorder le droit de grève aux enseignants et aux employés d'hôpitaux, d'autres provinces permettent à ces groupes professionnels, de même qu'aux employés municipaux de négocier collectivement sous l'empire de la législation du travail d'application générale, sans aucune restriction particulière. Les entreprises possédées par l'État de juridiction fédérale et de la plupart des provinces de même que plusieurs agences gouvernementales, sont également régies par la législation du travail d'application générale de sorte que leurs employés bénéficient des mêmes droits à la négociation collective que ceux qui sont accordés aux employés du secteur privé, y compris le droit de faire la grève.

LES DISPOSITIONS À CARACTÈRE DÉCISOIRES AUX NIVEAUX SUPÉRIEURS DE GOUVERNEMENTS

Le débat qui se déroule présentement au Canada quant à la négociation dans le secteur public et particulièrement quant aux modes de règlement des différends se situe présentement au niveau du domaine d'emploi du secteur public dans lequel un niveau supérieur de gouvernement est partie à la négociation collective. Sauf en Saskatchewan où les employés du gouvernement ont été régis par la législation du travail d'application générale depuis 1944, la négociation collective véritable pour les fonctionnaires fédéraux et provinciaux existe depuis moins de 10 ans. En 1965, le gouvernement du Québec a devancé les autres provinces et le gouvernement fédéral en accordant à ses fonctionnaires tous les droits à la négociation collective y compris le droit à la grève. Le gouvernement fédéral suivit en 1967 et le Nouveau-Brunswick fit de même en 1968. Même si ces juridictions sont les seules dans lesquelles les gouvernements permettent aux employés de faire la grève, toutes les autres provinces ont abandonné de façon formelle le pouvoir d'imposer un règlement en faveur de l'arbitrage obligatoire, ou bien sont sur le point de le faire. Le Manitoba s'est engagé à donner le droit de grève aux employés du gouvernement d'ici une année. On peut s'attendre à ce que la Colombie Britannique fasse de même sous peu. Même si les employés de certains niveaux supérieurs du gouvernement bénéficient maintenant du droit à la grève, il est clair qu'aucun consensus n'a été atteint en principe ou en pratique sur la procédure à suivre en cas d'impasse. La Saskat-chewan est la seule juridiction qui ne fait aucune distinction quant aux procédures de règlement des différends entre le secteur privé et le secteur public.

La loi fédérale exige que les employés du gouvernement choisissent entre deux méthodes de règlement des différends, l'arbitrage obligatoire ou le droit à la grève, avant que les négociations puissent débuter. Un agent négociateur qui choisit le droit de grève devra accepter que les services essentiels soient maintenus durant la grève. Ces services essentiels seront maintenus par des employés désignés par la Commission des relations de travail dans la fonction publique conformément à l'accord des parties ou, à défaut d'accord, à sa propre décision. Cette commission est un organisme tripartite établi de façon permanente par la législation fédérale pour administrer les mécanismes de règlement des différends en plus d'exercer ses responsabilités quant à l'accréditation des agents négociateurs, le renvoi des griefs à l'arbitrage, etc. Le caractère indépendant de cette commission élimine les situations de conflit d'intérêts qui peuvent se produire lorsqu'un gouvernement, qui est lui-même partie à un différend, nomme le conciliateur ou l'arbitre.

La province du Nouveau-Brunswick a adopté la plupart des aspects de la législation fédérale. Toutefois, alors que la loi fédérale exige que l'agent négociateur choisisse entre la conciliation et l'arbitrage avant de commencer les négociations, cette décision peut être prise en tout temps au Nouveau-Brunswick et peut être modifiée au cours des négociations.

Le Québec accorde aux employés des services publics le droit à la grève, sous réserve d'une suspension de 80 jours de l'exercice du droit de grève lorsque les services essentiels sont en jeux. Cette suspension est obtenue au moyen d'une injonction de la cour, mais de telles injonctions ont donné lieu à des outrages aux tribunaux, en maintes occasions. Alors que la Saskatchewan, le Nouveau-Brunswick et le gouvernement fédéral permettent que l'arbitrage soit substitué à l'exercice du droit de grève, le Québec ne permet pas à une tierce partie de prendre la décision sur des questions qui touchent le budget provincial.

CONSIDÉRATIONS DE PRINCIPE

La principale particularité des négociations collectives dans le secteur public découle du fait que le gouvernement est l'employeur. De par ses fonctions législatives et exécutives, son obligation de protéger les deniers publics et d'assurer la protection des services essentiels, un gouvernement est un employeur d'une nature très différente de celle que l'on trouve dans le secteur privé. Mais même si les fonctions multiples du gouvernement et les pressions particulières du public imposent des contraintes inévitables sur les relations de travail, certains problèmes peuvent être réduits au minimum. L'un d'eux est le conflit d'intérêt qui peut survenir lorsqu'un gouvernement, qui est lui-même partie à un différend, administre les mécanismes de conciliation et d'arbitrage. En établissant un organisme indépendant pour ces fins, les lois du gouvernement fédéral et du gouvernement du Nouveau-Brunswick ont pour effet de soustraire les décisions quant à ces mécanismes de toute influence politique.

La négociation collective est un phénomène relativement récent pour les niveaux supérieurs de gouvernement. Ainsi le manque de négociateurs expérimentés, particulièrement du côté gouvernemental, a quelques fois présenté de sérieux problèmes à la table de négociation. Les négociations ont parfois été rendues difficiles du fait que les négociateurs gouvernementaux ne possédaient pas toujours un mandat suffisant pour effectuer un règlement, particulièrement sur les clauses pécuniaires. Le gouvernement serait bien avisé de déléguer une autorité suffisante à des négociateurs expérimentés, non seulement pour effectuer un règlement mais aussi, ce qui est également important, pour inspirer aux négociateurs syndicaux la confiance qu'ils ont le pouvoir de le faire. Ceci aurait pour effet de faire disparaître certaines frustrations qui sont survenues dans la négociation du secteur public dans le passé.

Alors que la tendance dans le secteur public au Canada est de réduire au minimum les délais de conciliation, sinon de les éliminer entièrement, le haut niveau d'intérêt public dans le règlement de différends dans les services publics, la nature essentielle de plusieurs de ces services et l'expérience limitée des parties quant à la négociation collective semblent être de bonnes raisons pour continuer et même prolonger les procédures de conciliation dans ce secteur.

Mais qu'arrive-t-il en cas d'échec des négociations après que tous les mécanismes disponibles pour en arriver à une solution négociée ont été épuisés ? Certaines juridictions imposent alors l'arbitrage obligatoire des différends non résolus et d'autres permettent le choix entre l'arbitrage et la grève. Deux suggestions majeures ont été faites pour rendre l'arbitrage plus acceptable aux syndicats. La première consiste à confier l'administration du mécanisme d'arbitrage à une commission indépendante sur le modèle déjà établi par la loi fédérale et celle du Nouveau-Brunswick. La deuxième consiste à élargir le champ des questions qui peuvent être soumises à l'arbitrage.

Le droit de grève demeure la question la plus litigeuse des relations de travail dans le secteur public et l'expérience tant canadienne qu'américaine démontre que des grèves peuvent et vont avoir lieu même si elles sont prohibées par la loi. Le problème de l'*applicabilité* des lois ne doit pas être oublié lorsqu'une loi est à l'étude. Alors qu'il peut être difficile ou même injuste de priver la majorité des employés des services publics du droit qui est accordé aux employés du secteur privé, le problème crucial auquel font face les législateurs est celui de la définition des « services essentiels » et la garantie que ces services seront maintenus. Même si des dispositions à cet effet existent déjà au Québec, au Nouveau-Brunswick et au niveau fédéral pour assurer le maintien des services essentiels en cas de grève légale, la violation de ces dispositions durant la grève du secteur public au Québec et également par les techniciens en électronique de la fonction publique fédérale démontre que les sanctions légales actuellement prévues pour la non-observance de ces dispositions ne constituent pas un obstacle lorsque les employés sont suffisamment déterminés à les enfreindre. En se fondant sur cette expérience, il serait peut-être nécessaire de renforcer les sanctions pour non-observance. De plus, l'État peut toujours recourir à des mesures législatives spécifiques appropriées aux circonstances particulières de chaque cas. Les représentants élus du peuple ont le pouvoir ultime et la responsabilité de réagir à toute menace au bien-être du public.

Dispute Settlement in the Public Sector: The Canadian Scene

Shirley B. Goldenberg

A brief overview of the current provisions for impasse resolution at all levels of public employment is followed by a more detailled discussion of policy and practice in jurisdictions that grant the right to strike to the employees of senior levels of government. Finally, the author tries to identify some of the problems that complicate the settlement of disputes in the public sector and considers the challenge and the prospects of resolving these problems in the light of the Canadian experience.

The traditional resistance of governments to collective bargaining for their own employees dies hard in the United States although it has been eroded considerably in recent years. In Canada, on the other hand, it has virtually been eliminated. The majority of Canadian workers in public services are covered by comprehensive bargaining legislation and enjoy formal recognition [1]. Thus strikes over recognition dispu-

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1 Formal certification procedures, before a Board, are available to employees of the Federal government and a few of the provinces and to all municipal employees, just as they are in the private sector. In some provinces, however, the legislation granting collective bargaining to government employees designated an existing association of civil servants as the employee bargaining agent. This is known as statutory recognition and is contrary to the principle of freedom of choice.

tes are prohibited in all jurisdictions. So are strikes over rights disputes which must be settled by binding arbitration.

Most public service employees in Canada enjoy a formalized bargaining relationship with their employers and negotiate over a wider range of issues than American workers in similar employment [2]. The difference is particularly marked in the provisions for resolution of interest disputes. This paper will deal primarily with the provisions for finality in interest disputes in the Canadian public sector.

In contrast to the United States where public service strikes, though they do occur, have virtually always been in violation of the law, most Canadian municipal employees and many at the senior levels of government enjoy the legal right to withdraw their services over an impasse in negotiations, after prescribed procedures have been observed. Where the right to strike does not exist, there is the substitute of third party arbitration. Unilateral decision making by the government as employer has become a thing of the past in Canada.

The multiplicity of legislation under our federal system and the variety of experience to date show that no consensus has yet been reached, in policy or in practice, on the procedure to be followed when negotiations break down. With recent changes in a number of jurisdictions and anticipated changes in others, labour relations in the public sector are clearly in a state of flux. Thus some of the provisions cited below could well be outdated by the time this paper is published. However, the critical issues will undoubtedly remain, the most contentious of these being the right to strike.

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2 Although the Federal and provincial governments retain their management prerogatives with respect to the personnel function, i.e. hiring, firing, promotion, transfer, etc., the scope of collective bargaining with respect to wages, working conditions and other aspects of the employment relationship is much broader than in the case of senior levels of government in the United States. Compare, for example, the negotiable issues under the *Public Service Staff Relations Act* for Federal government employees in Canada with the provisions under Executive Order 10988 governing similar employees in the United States.

Given the vast scope of the public sector and the limited space in which to treat it, it is imperative to be selective. A brief overview of the current provisions for impasse resolution at all levels of public employment will be followed by a more detailed discussion of policy and practice in jurisdictions that grant the right to strike to the employees of senior levels of government. This is the area of public sector labour relations in which there have been the most significant innovations in recent years. Finally, we shall try to identify some of the problems that complicate the settlement of disputes in the public sector and consider the challenge and the prospects of resolving these problems in the light of the Canadian experience.

LABOUR LEGISLATION AND THE PUBLIC SECTOR

Much of the American literature on dispute settlement in the public sector is based on the experience of municipal workers and teachers, all of whom have been subject to state legislation prohibiting strikes by public employees although some have not observed it in practice. In Canada, on the other hand, municipal employees apart from police and firemen have been governed for many years by the same provincial labour laws as workers in the private sector; this has given them a virtually blanket right to strike [3]. Unions of police and firemen, with few exceptions, have either accepted binding arbitration under their own constitutions or had it imposed by law [4]. Thus in spite of the inconvenience to the public of certain municipal strikes and the occasional use of special measures to bring them to an end [5], the continuing policy debate over

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[3] This right is sometimes subject to particular procedures or delays. In Quebec, for example, a strike by municipal employees may be postponed by means of an injunction if a withdrawal of the services in question is considered prejudicial to public health and safety (*Quebec Labour Code*, S.99). Once the injunction expires, however, it cannot be renewed. This provision was used to restore snow removal services in Montreal in 1972.

[4] The following exceptions may be noted: Municipal police in Halifax and Sidney, Nova Scotia, exercised their legal right to strike in 1972. Montreal police and firemen struck in 1969 although prohibited from doing so by the *Labour Code* of Quebec. They were forced back to work by emergency legislation.

[5] For example, the legislation to end the strike of employees of the Montreal Transportation Commission in 1967.

the right to strike in the public sector seldom includes the case of municipal employees in Canada.

While a few provinces deny or otherwise restrict the right to strike in the case of teachers [6] and/or hospital workers, [7] others allow these occupational groups, like municipal employees, to bargain under general labour legislation without any particular restrictions. Crown corporations are also covered by general labour legislation in the Federal jurisdiction and in most of the provinces as are many government agencies. This means that workers in sectors such as railways, airlines, long-shoring and broadcasting at the federal level and those employed by hydro electric commissions, liquor boards, etc., at the provincial level enjoy the collective bargaining rights that are available to workers in the private sector, including the right to strike. While special legislation has sometimes been introduced to end a particular strike on grounds of damage

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6 Teachers are specifically excluded from the coverage of labour legislation and consequently from the right to strike in Prince Edward Island, British Colombia, Manitoba and Ontario. The Public Schools Acts of British Colombia and Manitoba provide for collective bargaining with binding arbitration of unresolved disputes. While there is no statutory provision for teacher bargaining in Ontario, the teachers negotiate under a system of voluntary recognition by their employers. Teachers in Saskatchewan are not excluded from the *Trade Union Act* but they bargain under different legislation, the *Teacher Salary Agreement Act* which, as amended in 1971, gives the Minister discretion to impose arbitration if conciliation efforts fail to produce a negotiated agreement. Teachers in Quebec have the right to strike under the *Labour Code* but Section 99 prohibits a strike without eight days prior written notice. This section also gives the government discretionary power to delay a strike for up to 80 days by appointing a board of inquiry into the dispute and taking an injunction to prevent or terminate the strike.

7 Hospital workers other than doctors are generally included in labour legislation but are subject to particular restrictions in some of the provinces. Section 99 of the *Alberta Labour Relations Act* gives the government discretion to forbid a strike or lockout in the hospital sector. Section 44 of the *Labour Relations Act of Prince Edward Island* substitutes binding arbitration for the right to strike in disputes involving hospital workers. While Ontario and Newfoundland do not exclude hospital employees from their general labour legislation, the *Hospital Labour Disputes Arbitration Act* (1965) in Ontario and the *Hospital Employees employment Act* (1966-67) in Newfoundland both prohibit strikes and lockouts in the hospital sector and provide for arbitration as a substitute. Section 99 of the *Quebec Labour Code* applies to the hospital sector as well as to other public services. As in the case of the teachers, this section may delay the exercise of the strike by hospital workers but does not prohibit it indefinitely.

to the public interest, such occasions have been rare [8]. Nevertheless, they serve as an important reminder of the ultimate sovereignty of parliament and its power to override the provisions of existing statutes to meet particular circumstances.

THE COVERAGE OF PUBLIC SERVICE LEGISLATION

The debate in Canada on public sector bargaining and particularly on the procedure for the settlement of disputes is currently focussed on the areas of employment that are subject to special public service legislation and/or in which a senior level of government is a party to the bargaining relationship. The coverage of public service legislation and the involvement of government in negotiations varies between jurisdictions. In a few provinces the public service legislation is limited almost entirely to workers employed in government departments, the traditional definition of the civil service [9]. Other provinces include the employees of government agencies, provincially operated vocational schools and mental

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[8] The Federal government has only resorted to emergency legislation in the case of railway workers (1950 and 1966) and dockers (longshoremen on the St. Lawrence and in British Columbia, both in 1972).

[9] The *Alberta Public Service Act* is confined to civil servants but a separate *Crown Agencies Employee Relations Act* covering the Liquor Control Board, Workmen's Compensation Board, Research Council of Alberta and other governmental agencies recognizes the Civil Service Association as sole bargaining agent for employees in these agencies and sets out virtually the same negotiating procedures, including the proscription on the strike, that are provided for civil servants under the *Public Service Act.*

The *Nova Scotia Joint Council Act* applies only to the civil service. Employees of government agencies and boards are subject to general labour legislation although a special provision postpones their right to strike for 30 days longer than in private sector cases.

The *Manitoba Civil Service Act* applies only to civil servants. Crown agencies such as Manitoba Hydro, Manitoba Telephone System, the Liquor Control Board, etc. are subject to the general labour legislation.

The *British Columbia Civil Service Act* applies mainly to civil servants but may also include « such personnel or Boards or Commissions as may from time to time be determined by the Lieutenant-Governor in Council. »

institutions in their Civil Service Acts [10]. New Brunswick and Quebec are the only jurisdictions in which a provincial government is directly involved in negotiatons with hospital and school board employees, as well as in the civil service, Crown enterprises and government commissions and boards. Thus the scope of provincial public services as defined above is broadest in these two provinces [11].

The *Public Service Staff Relations Act* (PSSRA) [12] governs labour relations in the Federal public service. In addition to covering the civil service as traditionally defined, the Act applies to a number of « separate employers », the Atomic Energy Control Board, the Defence Research Board, the Economic Council of Canada, the Medical Research Council, the National Film Board, the National Research Council, the

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10 The *Civil Service Act of Prince Edward Island* covers civil servants and employees of government agencies.

The *Newfoundland Public Service (Collective Bargaining) Act* applies to civil servants, government agencies and Crown corporations.

In Ontario, the *Crown Employees Collective Bargaining Act* applies to civil servants, employees of the Liquor Control Board, Ontario Housing Corporation and Niagara Parks Commission but excludes the Provincial Police and employees of applied arts and technical colleges.

Saskatchewan makes no statutory distinctions, for purposes of collective bargaining, between the public and private sectors. The government bargains in the capacity of a direct employer with the employees in provincially operated mental hospitals as well as with civil servants. Negotiations with these groups are conducted on behalf of the government by the chairman of the Public Service Commission. Crown corporations and their employees conduct their negotiations independently.

11 The *Quebec Civil Service Act* only mentions the employees of government departments, provincial security agents and CEGEPS. (Colleges d'Enseignement Général et Professionnel.) The latter are provincially financed junior colleges offering both academic and vocational education.

Another statute, an Act respecting collective negotiations in the education and hospital sectors (S.Q. 1971, c. 12), provides for province-wide negotiations for employees in all hospitals, schools and CEGEPS respectively and names the government as a party to the bargaining relationship.

Quebec government representatives participate in negotiations involving the Liquor Commission and some other Crown agencies but these negotiations are governed by the provisions of the general labour legislation.

The *Public Service Labour Relations Act* of New Brunswick has wider coverage than the civil service legislation in Quebec. This single statute covers the employees in all hospitals, schools, government agencies and boards in addition to those in the civil service.

12 *S.C.* 1967, c. 72.

Northern Canada Power Commission, the Public Service Staff Relations Board and the Science Council of Canada. The employees to whom the PSSRA applies are located in some seventy-five departments and agencies and are to be found in cities and towns across the country as well as in the far North and other isolated areas and in various posts and missions throughout the world. Bargaining units are certified on a national basis according to occupational categories.

PROVISIONS FOR FINALITY AT THE SENIOR LEVELS OF GOVERNMENT

While not all public employees in Canada now enjoy or are likely to acquire the legal right to strike, the practice of unilateral decision making by the government as employer has been virtually abandoned in recent years. With the notable exception of Saskatchewan where the government included its own employees in the coverage of general labour legislation as far back as 1944 [13], real collective bargaining for federal or provincial civil servants has existed for less than a decade. In 1965 the government of Quebec took the lead over the other provinces and even the Federal government in granting full collective bargaining rights, including the right to strike, to employees in the civil service [14]. The Federal government followed in 1967 and New Brunswick in 1968 [15]. While these are still the only jurisdictions in which governments permit their employees to strike, all the other provinces have either formally relinquished their power to impose a settlement or are just on the point of doing so.

Public service legislation in Alberta [16], Manitoba [17], Ontario [18] and Nova Scotia [19] provides for third party arbitration as the ultimate recourse in disputes that have reached an impasse. However, the Minister of Labour of Manitoba has recently made a public commitment to extend

13 *Trade Union Act,* R.S.S. 1965, c. 287.

14 *Civil Service Act,* S.Q. 1965, c. 14.

15 *Public Service Labour Relations Act,* S.N.B. 1968, c. 88.

16 *The Public Service Act,* R.S.A. 1970 c. 298, gave the government the ultimate power to impose a settlement in case of unresolved disputes but it was amended in 1971 (c. 89) to provide for third party arbitration.

17 *Civil Service Act,* R.S.M. 1970 c. 110. Arbitration was introduced in 1969 (SM 1969 [second session] c. 3). Before that, the government had the power to impose a settlement unilaterally.

18 *Crown Employees Collective Bargaining Act,* Bill 105, Ontario 1972.

19 *Joint Council Act,* R.S.N.S.1967, c. 35.

the right to strike to civil servants within the coming year [20]. While the Newfoundland statute [21] provides for collective bargaining rights, including the right to strike, it places such wide discretionary powers in the hands of the provincial Cabinet that some of these rights could well be rendered meaningless. The government is authorized, for example, to make regulations declaring a state of emergency in the public sector or part of it and forbidding the withdrawal of services or terminating a work stoppage already in progress. It may also make regulations exempting any employer or employee or any class or classification of employers or employees from any or all of the provisions of the Act. Thus the statutory protection against unilateral decision making is still of a very limited nature. Changes may now be expected, however. A recent inquiry into labour relations in Newfoundland has recommended compulsory arbitration by a permanent tribunal for the settlement of disputes in police, fire and hospital services. It also recommends compulsory arbitration for the first two rounds of negotiations in the civil service as such with the strike option on the Federal pattern after this preliminary experience with bargaining. The government would be vested with the power to declare an emergency and impose arbitration to prevent or terminate a strike in certain public utilities, whether or not they are publicly owned [22].

In two provinces at opposite extremities of the country, British Columbia [23] and Prince Edward Island [24], the relationship between the government and the civil service associations remains on a purely consultative basis. These governments retain the absolute power to impose their will in dealing with their employees. In both cases, however, changes appear to be on the way. A recent commission of inquiry recommended full collective bargaining rights, including the right to strike, to government employees in Prince Edward Island [25]. While most of the recommendations will probably be implemented, it seems likely that compulsory arbitration of interest disputes will be substituted for the recommendation on the right to strike.

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20 Although Bill 81 (1972), the recently amended *Labour Relations Act,* still excludes the civil service, a revised *Labour Code* promised for next year will include government employees in its coverage.

21 *Public Service (Collective Bargaining) Act,* S. Nfld. 1970, c. 85.

22 COHEN, Maxwell, *Report of the Royal Commission on Labour Legislation in Newfoundland and Labrador,* 1972, 561 pp.

23 *Civil Service Act,* R.S.B.C. 1960, c. 56, consolidated 1971, c. 56.

24 *Civil Service Act,* S.P.E.I. 1962, c. 5.

25 REVELL, J.J. *Collective Bargaining in the Public Services of Prince Edward Island,* January 1972. Confidential Report.

British Columbia should be an interesting province to watch in the coming months. Restrictive labour legislation and arbitrary decision making by the government were firmly entrenched under the Social Credit regime that had been in power since 1952. With the election of a New Democratic government in August of this year, liberalized legislation for public employees, most likely including the right to strike, may not be far away.

IMPASSE PROCEDURES WITH THE RIGHT TO STRIKE

Saskatchewan

We have already noted that Saskatchewan was the first Canadian jurisdiction to grant full collective bargaining rights, including the right to strike, to employees of a senior level of government. It still differs from the other provinces and the Federal government by virtue of the fact that it makes no statutory distinction between labour relations in the private and public sectors. The Trade Union Act makes no provision for compulsory arbitration of interest disputes in the private or public sector. However, it does allow for voluntary arbitration and provides machinery for conciliation. The conciliation machinery itself contains a germ of conflict although no serious problem has ever resulted from it. The unions note that the Minister of Labour appoints the conciliation board whether the dispute is in the private or public sector. They feel that a conflict of interest may exist when the government of which the Minister is a member is a party to the dispute. There have only been four instances of conciliation over the years and the government has implemented the recommendations of the conciliation board each time. Although the legislation permits conciliation boards to function as arbitration boards by written consent of the parties before the hearing commences, this has never been done. The emphasis in Saskatchewan has clearly been on negotiation between the parties and public service labour relations under this permissive legislation have been remarkably peaceful.

Québec

With the passage of the Labour Code [26] in 1964, public policy with respect to labour relations in Quebec was transformed from one of the most restrictive in the country to one of the most permissive. The right to strike was extended to all employees covered by the Code, with the exception of policemen and firemen. With the passage of the Civil Service

[26] *R.S.Q.* 1964, c. 141.

Act a year later, most of the provisions of the Labour Code, including the right to strike, were extended to employees of the provincial government. It should be noted, however, that although the Civil Service Act extended the general provisions of the Labour Code to civil service employees, the Quebec legislation, in contrast to Saskatchewan, makes certain distinctions between the private and public sectors.

There are special provisions governing the use of the strike in the public sector in Quebec. Civil servants, along with the employees in other public services [27], are subject to the regular conciliation procedures, and consequent delays on strike action, that are provided for all workers under the Labour Code [28]. In addition, Article 99 of the Code requires public service employees to give the Minister of Labour a minimum of eight days' notice of intention to strike and provides for an eighty-day suspension of the right to strike when, in the opinion of the Lieutenant-Governor in Council, « a threatened or actual strike in a public service endangers public health or safety » or « interferes with the education of a group of students. » This delay is achieved by the appointment of a board of inquiry which is given sixty days in which to ascertain the facts and make a report on its findings. The board has no power to make recommendations. Upon the establishment of a board of inquiry, the Attorney-General may then petition a Superior Court judge for an injunction to prevent or terminate a strike if he (the judge) finds that it imperils public health and safety or the education of a group of students. The injunction may continue for twenty days after the sixty-day period in which the board of inquiry is required to report. The union then acquires the legal right to strike ; no further injunction is permitted. This formula

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[27] These public services are defined in Section 1 (n) of the *Labour Code.*
« Public Services » — the following categories of employers :

(1) municipal and school corporations ;
(2) hospitals, sanatoriums and institutions for the mentally ill ;
(3) hospitals, crèches and orphanages ;
(4) universities, colleges and convents ;
(5) telephone and telegraph concerns and boat, tramway, autobus or railway transportation concerns ;
(6) Concerns for the production, transportation, distribution or sale of gas, water or electricity and transportation services by delivery car operated under an authorization of the Transportation Board ;
(7) garbage removal undertakings ;
(8) the services of the Government of the province and the other agencies or Her Majesty in the right of the Province, except the Quebec Liquor Board.

[28] *Labour Code,* S. 46.

for the suspension of the strike, like the Taft-Hartley provision in the United States, permits the government to act without delay in a situation it judges to be urgent.

In addition to the above delays on strike action by all employees in public services, government employees are also forbidden to strike, under Article 70 of the *Civil Service Act,*

> ... unless the essential services and the manner of maintaining them are determined by prior agreement between the parties or by decision of the Quebec Labour Relations Board.

This decision would now be made by the Labour Court which has replaced the Labour Board.

While these are the formal provisions of the law, it is important to note that they have not always been observed in practice. A strike by civil service professionals in 1966 was technically illegal as the unions did not go through the prescribed conciliation delays. They questioned the legitimacy of a conciliation procedure in which the Minister charged with appointing a conciliator was, in effect, also a party to the dispute. Hospital employees ignored court orders to return to work during a general public service strike last April. There had been no agreement on the maintenance of « essential services » before the strike began. The Quebec experience shows that the provisions of a law are only effective to the extent that they can be enforced.

Finally, with respect to the settlement of disputes, Quebec differs from other jurisdictions in making no provision for arbitration. It will not permit a third party to decide the wage bill in the public sector. As the most recent negotiations included all the provincial public services bargaining together, nearly half the gross provincial budget was involved [29]. Budgetary priorities, the government insists, must remain a Cabinet responsibility.

It is important to realize that the unions involved in the last round of public sector bargaining in Quebec had also been acting in concert on

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29 The combined wage bill for the civil service, hospitals, schools, CEGEPS, Liquor Commission and Hydro-Quebec, as well as units of security agents, social workers, etc., reached 1.8 million dollars in 1971, approximately 45 percent of the gross provincial budget. Statistics from a speech by the Hon. Raymond Garneau, Minister of Finance, March 7, 1972. Cited in *Le Devoir,* Montreal, March 9, 1972.

a number of political issues as well as in disputes in the private sector [30]. This complicated the climate at the bargaining table. The negotiations that culminated in a general public service strike were characterized by a political dimension that went beyond the conventional issues, and tactics, of a labour-management dispute. The formal union demands were based mainly on wages, working conditions and job security, the usual subject matter of collective bargaining, but the negotiations, from the outset, took the form of a political confrontation between the union leaders and the government. The strike was legal in that the unions had observed the compulsory delays and given the required notice. On the other hand, their failure to agree on the maintenance of essential services, and the ignoring of injunctions that had been granted to assure these services, were clearly in defiance of the law. Special legislation was passed to force the public service unions back to work [31]. However, this legislation suspended the right to strike rather than revoke it permanently. It provided for a contract imposed by government decree if negotiations did not produce a settlement within a two-month period. The original deadline for a negotiated settlement was subsequently extended and a four-year agreement was eventually signed by all but the teachers and Liquor Board employees. The government imposed a decree with respect to wages for the latter groups but negotiations on other disputed items were still proceeding at the time of writing.

This is not the first time that *ad hoc* measures have been used in Quebec in the case of a public interest dispute. A hospital strike was terminated in 1966 by placing the hospitals under trusteeship. A year later a law was passed to end legal strikes in the schools [32]. Special legislation has also ended other strikes which are beyond the scope of this discussion — strikes by bus drivers, construction workers, doctors, policemen, firemen, etc. The most recent case of back to work legislation ended a 9-day strike at Hydro Quebec. A special act, « Bill 73, » was passed on November 15, 1972 to force the resumption of work by employees

30 For example, *Bill 63* on language rights in the schools, Medicare legislation, etc. These were enacted in 1970, well before the last negotiations commenced. During the negotiations there were some joint rallies on unemployment and other issues as well as on behalf of strikers in private sector disputes such as the one at the newspaper, *La Presse*.

31 *Bill 19,* April 21, 1972. An Act to ensure resumption of Services in the Public Sector.

32 This was the famous *Bill 25* an act to ensure for children the right to education and to institute a new schooling collective agreement plan, S.Q. 1967, c. 63.

engaged in broadly defined essential services. It provided severe penalties for non-compliance. Thus, while emergency measures have been used to terminate particular disputes, it should be noted that the general right to strike in public services still remains on the statute books.

A special inquiry committee has recently been reassessing the state of labour relations in the public sector and legislation based on its recommendations will soon be presented to the National Assembly. The Minister of Labour has indicated that the proposed legislation will not proscribe the right to strike as such but that it will make special provisions with respect to the maintenance of essential services. It is ironic that the province that began the trend of the sixties toward the right to strike in the public sector now feels a need to write restrictive clauses into its labour legislation.

The Federal Public Services

The Federal jurisdiction was the next to extend full collective bargaining rights, including the right to strike, to employees of a senior level of government. However, the Federal statute did more than follow the precedents set in Saskatchewan and Quebec. It introduced a novel procedure under which a bargaining agent must choose between alternative methods of dispute settlement before negotiations can begin. It also established an independent body, the Public Service Staff Relations Board (PSSRB), which administers the provisions governing dispute settlement in addition to performing responsibilities with respect to certification, the referral of grievances to adjudication, etc. [33] The independent character of this Board avoids the conflict of interest situations that can occur when a government that is itself a party to a dispute appoints the conciliator or arbitrator.

The PSSRB is a permanent tri-partite body appointed by the government. It consists of an equal number of members representing labour and management and a neutral chairman and vice-chairman. All members of the Board are appointed for a fixed term of years thus assuring their independence of the government.

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[33] A permanent corps of « adjudicators » (grievance arbitrators) was established under the supervision of a Chief Adjudicator for the disposition of grievance disputes. All adjudicators have tenure for a fixed term. Their independence is assured by the system of appointment. Although the appointment of the adjudicators rests with the government, appointments can only be made on the recommendation of the PSSRB which is itself tripartite and independent.

An employee organization, once it has been certified by the PSSRB, must specify its choice of dispute resolution procedure before serving notice to bargain. Two options are available :

a) referral of a dispute to arbitration,

or

b) referral of a dispute to a conciliation board.

The bargaining agent may change its choice of method of dispute settlement prior to the commencement of negotiations for another collective agreement. It is interesting to note that the bargaining agent has the sole right of choice of method. This cannot be vetoed by the employer.

Whichever option is chosen, conciliation officers may be named to assist the parties to reach agreement prior to the ultimate step in the process. Where the conciliation board route has been specified as the method of dispute settlement, either party may request the appointment of such a board when negotiations reach an impasse. The power to establish a conciliation board is vested in the Chairman of the Public Service Staff Relations Board. A conciliation board is a tripartite body, appointed on an *ad hoc* basis. It consists of a nominee of each of the parties and a chairman nominated by the two representative members or, if they cannot agree, by the Chairman of the PSSRB. A conciliation board is required to try to effect a settlement but if it does not succeed, it must present a report of its findings and recommendations [34].

The recommendations of a conciliation board are not binding and the union acquires the right to strike seven days after a report is submitted. However, some employees in a bargaining unit that has a legal right to strike may still be prohibited from withdrawing their services. The Act provides for the maintenance of services that are regarded as essential for the safety or security of the public. For this purpose, the employer must submit a list of « designated employees » to remain on the job in the event of a strike but if the bargaining agent objects to the list, the determination is made by the PSSRB. Negotiations cannot begin before agreement has been reached on the list of designated employees. This is in contrast to Quebec which, although it requires agreement on the maintenance of essential services before a legal strike can take place, leaves the discussion on the means of assuring these services to the

34 The method of appointment and the composition of conciliation boards is virtually the same as in the private sector. The report of a conciliation board in Canada is not as detailed as the report of a Fact Finding board in the United States.

eleventh hour of negotiations. Finally, Section 112 (1) of the PSSRA gives the government an overriding authority to make orders necessary « in the interest of the safety or security of Canada or any state allied or associated with Canada. » Orders made under this provision are not subject to review.

Where the bargaining agent has opted for arbitration rather than the right to strike, either party may refer a dead-locked dispute to the Public Service Arbitration Tribunal. This is a permanent body, in contrast to the *ad hoc* conciliation boards. A neutral chairman is appointed for a five-year renewable term by the Governor in Council on the recommendation of the PSSRB. Two panels of members, representative of the interests of employer and employees respectively, are appointed by the Board. On each reference to arbitration, the Tribunal consists of the chairman and one member representative of the interests of the employer and one member representative of the interests of the employees, the representative members being selected by the Chairman of the PSSRB from the members of the respective panels which in turn had been appointed by the Board. The role of the PSSRB and its chairman is clearly of great significance in administration of the arbitration machinery under the Act as well as in the case of conciliation procedures.

Awards are final and binding under this innovative system of voluntary arbitration. In rendering its awards the Tribunal is required to consider :

(a) the needs of the Public Service for qualified employees ;

(b) the conditions of employment in similar occupations outside the Public Service, including such geographic, industrial or other variations as the Arbitration Tribunal may consider relevant ;

(c) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service ;

(d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered ; and

(e) any other factor that to it appears to be relevant to the matter in dispute [35].

[35] PSSRA, s. 73.

The PSSRA allows the Arbitration Tribunal to deal with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto. But no arbitral award may deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or conditions of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.

The choice between the strike and arbitration routes may be affected by a number of factors : the proportion of designated employees in a bargaining unit, the size and strength of the bargaining unit and the likely impact of a strike. Let us look at the record to date.

The experience of collective bargaining under the PSSRA does not bear out the predictions of some early prophets of doom. Out of 81 barbaining units that have been certified for civil service employees only 18 have now opted for the conciliation board method of dispute settlement. One hundred and ninety-two collective agreements were negotiated, without resort to strike or arbitration, between the Treasury Board and the employees of government departments during the period March 13, 1967 to October 31, 1972. There were five strikes in this period, of which four had considerable public impact. Two of them were by postal workers (1968 and 1970) who, it should be noted, had already gone on strike (1965) before there was a law allowing it. The two other strikes causing serious public inconvenience involved air traffic controllers and electronic technicians, both in 1972. A one week strike by the ship repair group (1971) had no national impact. The right to strike under the PSSRA has clearly not ground the Federal public service to a halt.

Although the vast majority of bargaining units have specified the arbitration method of dispute resolution, only 30 disputes were settled by arbitration in the period noted above [36]. Well over 90 percent of the units that opted for the arbitration route in the first round of negotiations

[36] The Treasury Board bargains on behalf of the government in the negotiations with civil service unions. The figures cited here do not include the « separate employers » covered by the PSSRA. However, there have been no strikes by employees of the separate employers. Statistics on negotiated settlements, strikes and arbitral awards between March 13, 1967 and March 31, 1972 from CONNELL, J.P., Deputy Secretary, Treasury Board, *Collective Bargaining in the Public Service of Canada,* Paper delivered to the National Seminar on Collective Bargaining in the Public Sector, Institute of Public Administration of Canada, Quebec, June 1972. Statistics provided by PSSRB for period since April 1, 1972.

settled without resort to arbitration. The resort to arbitration increased considerably in the next round of bargaining, with a formal reference to arbitration by about 45 percent of the units, but almost 50 percent of the cases formally referred were settled by the parties subsequent to the reference and a number were even settled after the arbitration hearing but before an award was rendered [37]. While the percentage of referrals to arbitration in the third negotiations will not be known for a while, the small proportion of arbitral awards compared with negotiated settlements to date shows that the availability of arbitration under the PSSRA has not seriously undermined the bargaining process. This result may well be related to the voluntary aspect of arbitration under the PSSRA. If we consider the experience in Ontario, for example, where there is compulsory arbitration of unresolved disputes, the figures are significantly different. Of the 16 sets of negotiations that have taken place since 1965, when collective bargaining for civil servants began, only four were settled directly by the parties, another five at the mediation stage and the remainder, nearly 50 percent went the whole route to arbitration.

Finally, we may note a significant element in the bargaining process at the Federal level which is not even mentioned in the legislation. This is the Pay Research Bureau, an independent research organization under the administrative jurisdiction of the PSSRB, whose terms of reference require it to provide factual, objective and impartial information « on rates of pay, employee earnings, conditions of employment and related practices prevailing both inside and outside the Public Service to meet the needs of the parties to bargaining. » While this has not necessarily helped labour and management to agree on what constitutes appropriate wage rates in the public service they can at least agree on some objective statistics before they commence negotiations. The Chairman of the PSSRB, no doubt talking from his own experience, has noted the particular value of objective statistics when a dispute reaches conciliation or arbitration :

> The fact that the third party can rely on authentic, objective information not only contributes to speedier disposition by the third party of the issues in dispute, but also eliminates the feeling that mediators and arbitrators often have that, in the limited time at their disposal, they have to make decisions at times based on nothing more than an intelligent guess as to what the true facts may be. [38]

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[37] Percentages on referral to arbitration taken from Jacob FINKELMAN, Chairman, PSSRB, *Finality in Public Sector Bargaining — The Canadian Experience*, Paper delivered to the International Conference on Trends in Industrial and Labour Relations, at Tel Aviv, Israel, January 1972.

[38] *Ibid.*

New Brunswick

The Province of New Brunswick granted the right to strike to employees in public services within a year of the action by the Federal government. Prior to this, it assumed full financial responsibility for health and education services, becoming the effective employer, from the financial point of view, of all hospital and school employees [39]. Thus New Brunswick's Public Service Labour Relations Act (PSLRA) has the broadest scope of any public service legislation in Canada, covering all hospital and school employees along with the civil service as traditionally defined and the employees of government agencies and boards. Public service bargaining units are certified on an occupational basis as is the case for Federal civil servants.

The New Brunswick statute reflects to a substantial degree the legislation that had previously been implemented at the Federal level but it also contains some interesting modifications, particularly in the provisions for the settlement of disputes. In contrast to Saskatchewan, but like Quebec and the Federal government, public policy in New Brunswick recognizes certain differences between private and public sector bargaining. Like the Federal statute, the New Brunswick Act provides separate machinery, the Public Service Labour Relations Board (PSLRB), to administer labour relations in the public services. In addition to certifying bargaining units, this Board in New Brunswick, like its counterpart at the Federal level, plays an important role in the area of dispute settlement. New Brunswick has removed the decisions with respect to conciliation and arbitration from the political arena by assigning them to the Board. This avoids the conflict of interest situations of which unions have complained in some of the other provinces.

Although public service employees in New Brunswick have the right to strike, the procedures by which this right is acquired differ from those in the private sector. The Public Service Labour Relations Act, like the Federal Act, provides public service employees with the alternative of conciliation or arbitration when negotiations reach an impasse; the first alternative contains the possibility of a strike, the second involves a compulsory settlement. However, whereas the Federal act requires the

[39] When the government of New Brunswick adopted its Equal Opportunities Program in 1967, it assumed financial responsibility for services, including health and education, that were formerly administered by the municipalities. New Brunswick is the only province in which hospitals and schools are financed entirely at the provincial level.

bargaining agent to choose between conciliation and arbitration prior to commencing negotiations, this decision may be taken at any time in New Brunswick and may actually be changed as negotiations proceed. There have been some occasions, in practice, where after the completion of conciliation procedures the union has indicated its willingness to accept binding arbitration.

There is a forty-five day statutory time limit on public sector negotiations — unless the parties agree otherwise. The Chairman of the PSLRB *may* appoint a conciliator to assist in the negotiations if asked to do so by either of the parties. However, if it appears to the Chairman that the parties are not likely to reach agreement he must appoint a conciliation board within fifteen days of the statutory, or agreed upon, time limit on the bargaining. A conciliation board consists of a member named by each of the parties who in turn select a chairman. As is the case at the Federal level, the establishment of a conciliation board, though compulsory in New Brunswick, cannot take place before the parties have agreed on, or the PSLRB has determined, a list of « designated » employees whose jobs are « necessary in the interest of health, safety or security of the public » and who shall not take part in a strike.

A conciliation board must submit a report to the Chairman of the PSLRB if it fails to effect a settlement but if the parties do not settle following the report they are still not free to strike. At this stage, either party may request the Chairman of the PSLRB to declare that a « deadlock » exists. If he is satisfied that the required conciliation procedures have been observed, the Chairman declares a deadlock and asks the parties if they are prepared to submit the dispute to arbitration. The Act provides for an Arbitration Tribunal consisting of a chairman appointed by the government and two other members, representative of the interests of the parties. The latter are selected by the Chairman of the PSLRB from two permanent panels of arbitrators, originally named by the Board. The award of the Tribunal is binding, should the parties accept the « arbitration route. » If either party rejects arbitration, the union is free to conduct a vote among its members « to determine whether they desire to take strike action. » A majority vote in the affirmative gives the union the legal right to strike. Should a majority vote against a strike the Chairman of the PSLRB orders the parties to resume negotiations for a period of twenty-one days after which, if agreement has not been reached, either party may again request the Chairman to declare that a deadlock exists. The process continues to repeat itself until the parties either reach a negotiated settlement, agree to submit to arbitration, or the bargaining

agent secures a majority strike vote after which a legal work stoppage may take place.

There has only been one instance in practice in which a deadlock has been declared but the machinery for taking a strike vote was not employed. The parties agreed to delay such action and returned to the bargaining table where an agreement was reached.

It should be noted that New Brunswick differs from the other jurisdictions in which a strike is permitted by requiring a strike vote after all other legal delays have been exhausted. A noted Canadian expert on labour relations made the following comment on this particular feature of the New Brunswick legislation :

> The compulsory strike-authorization vote in New Brunswick introduces an element of realism in that province's procedure. It is the membership of the unit of employees, acting after an impasse has been reached and at least one party has rejected arbitration, who really make the strike decision. On balance, the option of voting for a strike or for further negotiations can probably be expected to have a conservative effect since the voter will be concerned with an imminent strike situation, whereas in the federal procedure the decision has been taken when those who take it are protected by a very considerable period of time from the strike itself. Also in New Brunswick a vote against a strike does not carry with it a repudiation of the strike procedure, but only an instruction from the membership to their bargaining agent to have another try. If this leads to failure the membership may revise their vote after a relatively short period of time. [40]

PECULIARITIES OF THE PUBLIC SECTOR AND THEIR IMPLICATIONS FOR THE SETTLEMENT OF DISPUTES

The Government as Employer

The major peculiarity of public sector bargaining flows from the fact that the government is the employer.

A government, by virtue of its legislative and executive functions, its obligation to protect the public purse and to ensure the provision of essential services, is clearly a very different kind of employer than one finds in the private sector. However, while multiple government functions place inevitable constraints on the bargaining relationship, the Canadian experience has shown that the problems can be exaggerated or minimized,

40 Professor H.D. Woods, McGill University, unpublished manuscript, 1972.

depending on how they are handled. The following problems can seriously prejudice the bargaining relationship and complicate the resolution of negotiation disputes, regardless of the substantive issues involved. Let us see what lessons can be learned with respect to these problems in the light of the Canadian experience.

CONFLICT OF INTEREST

The power relationship in public sector bargaining is distorted by the fact that one of the parties, in the final analysis, can legislate an end to a dispute. But other conflicts of interest may be minimized. One of these is the conflict of interest that can arise when a government, which is itself a party to a labour dispute, administers the machinery for conciliation or arbitration. By establishing an independent body to administer the provisions of the legislation governing certification, conciliation, arbitration, the adjudication of grievances, etc. both the Federal Government and the province of New Brunswick have removed the decisions on these procedures from all political influence. In so doing, they have eliminated a major source of criticism to which governments have been subject as employers and consequently a major source of tension as negotiations approach finality.

THE MANDATE OF GOVERNMENT NEGOTIATORS

With collective bargaining being a relatively recent phenomenon at senior levels of government in Canada, the lack of experienced negotiators, particularly on the government side, has sometimes presented serious problems at the bargaining table. The bargaining process has also been complicated by the nature of political decision making. Government negotiators, whether senior functionaries or hired experts, often lack the authority, as well as the ability, to make a final decision. Lacking a precise mandate to effect a settlement, particularly on monetary issues, some government negotiating committees have required constant recourse to the political authority for which they are simply the spokesmen. Frequently when it comes to the « crunch, » decisions may be made at the Cabinet level rather than at the bargaining table. The consequences for « good faith » bargaining are self evident and may be a partial explanation, at least, for the slow pace of negotiations, with the consequent build-up of frustration and tension, in a lot of public sector bargaining. This has been a particular problem where governments have established a bargaining relationship before defining a clear-cut policy on the issues that are likely to arise. If policy decisions are made on an *ad hoc* basis

as bargaining proceeds, the union soon realizes that it must look to the political authority rather than to the negotiators at the bargaining table. Resort to a strike to pressure the public authorities by arousing public opinion may be tempting in such circumstances.

Saskatchewan, with the longest bargaining experience in the provincial public services, seems to have had the greatest success in the use of delegated authority. As noted already, the Chairman of the Public Service Commission acts as the sole spokesman for the provincial government in bargaining with public employees. The Cabinet gives him full authority to conclude an agreement, in accordance with pre-defined instructions and limitations, using whatever strategy he can command. Other governments might do well to follow the example of Saskatchewan by delegating sufficient authority to *experienced negotiators,* not only to make a deal, but equally important, to inspire confidence in the union negotiators that they have the authority to do so. This may relieve at least some of the frustrations that have occurred in public sector bargaining in the past. Otherwise, the cabinet ministers themselves may have to come to the bargaining table.

Pressures on the Parties

THE GOVERNMENT

Governments face fewer economic constraints in collective bargaining than employers in the private sector. Wage policy is not tied to a profit position or strict capacity to pay. A government does not measure the productivity of its services and it will not close down if it operates at a deficit. Another economic constraint is also absent — the potential financial loss of a strike. While a private employer must calculate the cost of a wage increase against the losses that might be incurred in a strike, work stoppages in a public service — apart from the Liquor Commission or Municipal Transportation Commission — are a financial saving to the employer.

However, while the profit-loss criterion is usually absent in determining wage policy in the public sector, a government cannot ignore the pattern-setting effect of negotiated settlements with its own employees and their repercussions on the economy as a whole. It also faces particular constraints as the guardian of the public purse and the elected representative of the people. A government is caught, in effect, between its obligation to protect the taxpayers' money and the need to provide its own employees with reasonable wages and working conditions. It is also

responsible for providing the services for which the public has been taxed. This is a major factor that politicians must consider when bargaining threatens to break down.

THE UNIONS

Public service unions, unlike the governments they confront, are subject to all the economic pressures they would face in the private sector. Their ability to withstand the cost of a strike must be measured against anticipated gains. The public reaction to their wage demands must also be considered. It has frequently been noted that people who are paid less and work longer hours than civil servants may object to increases for public employees from the taxes on their own hard-earned money. Finally, the unions must judge how much the public will « take » in the case of a strike, before it pressures the government to stop them. With the results of public sector bargaining frequently affecting the general public more than the parties to the dispute, public opinion must be an important factor in determining bargaining tactics. This brings us to the most serious policy question with respect to labour relations in the public services — the handling of an impasse in negotiations.

Procedures in Case of Impasse

COMPULSORY DELAYS

While the trend in the private sector in Canada is now to minimize conciliation delays, if not to eliminate them entirely, the high level of public interest in the settlement of disputes in the public services, the essential nature of many of the services involved, and the limited bargaining experience of the parties concerned, seem good reason for the continuation, or even the extension, of conciliation procedures in this area. It has already been noted, however, that conciliation procedures can be more acceptable to the unions, and consequently more effective, if administered by a quasi-judicial board independent of the political authority rather than by a government which is itself a party to the dispute.

Some observers have suggested the use of a fact finding board, on the American pattern, to follow the progress of negotiations in public service disputes. Such a board would differ from the Board of Inquiry provided in Section 99 of the Quebec Labour Code by virtue of its responsibility to publish the facts, to keep the public informed on the issues in dispute and on the position taken by the parties. The proponents of fact finding boards feel that the pressure of enlightened public opinion

might have a moderating influence on bargaining tactics, in certain cases at least.

ARBITRATION

But what if the bargaining breaks down after all the available procedures for a negotiated settlement have been exhausted? A number of provincial governments have relinquished their power to impose a settlement in favour of binding arbitration. Only three provinces and the Federal government have gone all the way to permitting the right to strike. However, while the Federal government, New Brunswick and Saskatchewan allow voluntary arbitration as a substitute for the strike, Quebec refuses to submit to a third party decision on any matter affecting the provincial budget. In considering the effect of arbitration on the bargaining process itself we noted that Ontario's use of compulsory arbitration seemed to inhibit the bargaining process while the Federal experience with voluntary arbitration was otherwise. This may well be due to the flexibility of the Federal system where a bargaining agent choosing the arbitration route can change its option for a subsequent round of negotiations.

There have been two major suggestions to make the arbitration route more acceptable to the unions. The first would provide for the administration of arbitration procedures by an independent board, on the pattern already established by the Federal and New Brunswick statutes. The second would broaden the scope of arbitrable issues.

Claude Edwards, President of the Public Service Alliance of Canada, the largest union in the Federal public service, has suggested that the PSSRA be amended, not to take away the right to strike, but to make arbitration a more attractive alternative. He criticized the existing statute for limiting the items on which an arbitrator may rule, noting that many issues that can be settled by conciliation and strikes are not subject to arbitration [41]. The policy makers would do well to take this criticism into account in considering amendments to the statute.

THE RIGHT TO STRIKE

An acceptable formula for the settlement of deadlocked disputes without resort to the strike would clearly be the ideal. But ideals are seldom realized where human factors are involved. Thus to withdraw the

[41] Speech to a convention of the solicitor-general component of the PSAC. Reported in the *Montreal Gazette,* April 22, 1972.

right to strike in the public sector where it already exists, or even to refuse it where it has not yet been granted, will not necessarily solve the problem. While there is a tendency in some quarters to blame strikes in the public sector on permissive legislation, experience has shown that strikes can and will occur even when forbidden by law.

Consider, for example, the Canadian and American experience at the Federal level in recent years. While Canadian postal employees and air traffic controllers were exercising their legal right to strike under the PSSRA, strikes were occurring among the same groups in the United States, in spite of a legal prohibition, just as there had been a strike by postal workers in Canada before it was permitted by law. In this connection it is well to note the following observation by the distinguished Chairman of the PSSRB who has administered the innovative provisions of the Federal legislation with such infinite patience and wisdom :

> ... government is in a much happier situation when it sits across the table from leaders of unions who are acting within the law than it would be if it is called upon to deal with a band of outlaws. [42]

THE PROTECTION OF ESSENTIAL SERVICES

As it may be difficult, or even unfair, to deprive a majority of workers in public services of rights that are available in the private sector, the most crucial question facing the policy makers is the definition of « essential services » and the guarantee that these will be maintained. Where a private right, the right to strike, clearly becomes a public wrong by jeopardizing the health or safety of a community, the public interest must prevail. Although legal provisions already exist in Quebec, New Brunswick and at the Federal level to assure that essential services will be maintained, the defiance of these provisions during the public sector strike in Quebec and also by electronic technicians in the Federal service show that present statutory penalties for non-compliance are not a deterrent if workers are sufficiently determined to defy them. On the basis of this experience it would seem logical to strengthen the penalties for non-compliance. While the Quebec government is currently drafting new legislation to define the nature of essential services and to guarantee their maintenance in the event of a strike, the problem of enforceability remains crucial. Unless this problem is satisfactorily resolved, and it is unlikely that it can be entirely, *ad hoc* legislative measures, appropriate to particular circumstances, always remain a possibility. The elected re-

[42] FINKELMAN, *loc. cit.*

presentatives of the people have the ultimate power, and responsibility, to respond to a threat to the public welfare.

LE RÈGLEMENT DES DIFFÉRENDS DANS LE SECTEUR PUBLIC CANADIEN

Les employés de tous les niveaux de gouvernements ainsi que des services parapublics tels les hôpitaux et les écoles bénéficient au Canada de droits plus étendus à la négociation collective qu'aux États-Unis. Le contraste est particulièrement marqué en ce qui a trait au règlement des différends alors qu'une portion importante et grandissante d'employés de services publics au Canada bénéficient d'un droit à la grève reconnu par la loi.

LA LÉGISLATION DU TRAVAIL ET LE SECTEUR PUBLIC

Les employés municipaux autres que les policiers et pompiers ont depuis plusieurs années été régis par les mêmes lois provinciales du travail que les ouvriers du secteur privé ; ceci leur a donné un droit de grève sans restriction. Les syndicats de policiers et pompiers, sauf quelques exceptions, ont accepté l'arbitrage obligatoire en vertu de leur propre constitution ou ils se le firent imposer par la loi. Alors que certaines provinces imposent l'arbitrage obligatoire plutôt que d'accorder le droit de grève aux enseignants et aux employés d'hôpitaux, d'autres provinces permettent à ces groupes professionnels, de même qu'aux employés municipaux de négocier collectivement sous l'empire de la législation du travail d'application générale, sans aucune restriction particulière. Les entreprises possédées par l'État de juridiction fédérale et de la plupart des provinces de même que plusieurs agences gouvernementales, sont également régies par la législation du travail d'application générale de sorte que leurs employés bénéficient des mêmes droits à la négociation collective que ceux qui sont accordés aux employés du secteur privé, y compris le droit de faire la grève.

LES DISPOSITIONS À CARACTÈRE DÉCISOIRES AUX NIVEAUX SUPÉRIEURS DE GOUVERNEMENTS

Le débat qui se déroule présentement au Canada quant à la négociation dans le secteur public et particulièrement quant aux modes de règlement des différends se situe présentement au niveau du domaine d'emploi du secteur public dans lequel un niveau supérieur de gouvernement est partie à la négociation collective. Sauf en Saskatchewan où les employés du gouvernement ont été régis par la législation du travail d'application générale depuis 1944, la négociation collective véritable pour les fonctionnaires fédéraux et provinciaux existe depuis moins de 10 ans. En 1965, le gouvernement du Québec a devancé les autres provinces et le gouvernement fédéral en accordant à ses fonctionnaires tous les droits à la négociation collective y compris le droit à la grève. Le gouvernement fédéral suivit en 1967 et le Nouveau-Brunswick fit de même en 1968. Même si ces juridictions sont les seules dans lesquelles les gouvernements permettent aux employés de faire la grève, toutes les autres provinces ont abandonné de façon formelle le pouvoir d'imposer un règlement en faveur de l'arbitrage obligatoire, ou bien sont sur le point de le faire. Le Manitoba s'est engagé à donner le droit de grève aux employés du gouvernement d'ici une

année. On peut s'attendre à ce que la Colombie Britannique fasse de même sous peu. Même si les employés de certains niveaux supérieurs du gouvernement bénéficient maintenant du droit à la grève, il est clair qu'aucun consensus n'a été atteint en principe ou en pratique sur la procédure à suivre en cas d'impasse. La Saskatchewan est la seule juridiction qui ne fait aucune distinction quant aux procédures de règlement des différends entre le secteur privé et le secteur public.

La loi fédérale exige que les employés du gouvernement choisissent entre deux méthodes de règlement des différends, l'arbitrage obligatoire ou le droit à la grève, avant que les négociations puissent débuter. Un agent négociateur qui choisit le droit de grève devra accepter que les services essentiels soient maintenus durant la grève. Ces services essentiels seront maintenus par des employés désignés par la Commission des relations de travail dans la fonction publique conformément à l'accord des parties ou, à défaut d'accord, à sa propre décision. Cette commission est un organisme tripartite établi de façon permanente par la législation fédérale pour administrer les mécanismes de règlement des différends en plus d'exercer ses responsabilités quant à l'accréditation des agents négociateurs, le renvoi des griefs à l'arbitrage, etc. Le caractère indépendant de cette commission élimine les situations de conflit d'intérêts qui peuvent se produire lorsqu'un gouvernement, qui est lui-même partie à un différend, nomme le conciliateur ou l'arbitre.

La province du Nouveau-Brunswick a adopté la plupart des aspects de la législation fédérale. Toutefois, alors que la loi fédérale exige que l'agent négociateur choisisse entre la conciliation et l'arbitrage avant de commencer les négociations, cette décision peut être prise en tout temps au Nouveau-Brunswick et peut être modifiée au cours des négociations.

Le Québec accorde aux employés des services publics le droit à la grève, sous réserve d'une suspension de 80 jours de l'exercice du droit de grève lorsque les services essentiels sont en jeux. Cette suspension est obtenue au moyen d'une injonction de la cour, mais de telles injonctions ont donné lieu à des outrages aux tribunaux, en maintes occasions. Alors que la Saskatchewan, le Nouveau-Brunswick et le gouvernement fédéral permettent que l'arbitrage soit substitué à l'exercice du droit de grève, le Québec ne permet pas à une tierce partie de prendre la décision sur des questions qui touchent le budget provincial.

CONSIDÉRATIONS DE PRINCIPE

La principale particularité des négociations collectives dans le secteur public découle du fait que le gouvernement est l'employeur. De par ses fonctions législatives et exécutives, son obligation de protéger les deniers publics et d'assurer la protection des services essentiels, un gouvernement est un employeur d'une nature très différente de celle que l'on trouve dans le secteur privé. Mais même si les fonctions multiples du gouvernement et les pressions particulières du public imposent des contraintes inévitables sur les relations de travail, certains problèmes peuvent être réduits au minimum. L'un d'eux est le conflit d'intérêt qui peut survenir lorsqu'un gouvernement, qui est lui-même partie à un différend, administre les mécanismes de conciliation et d'arbitrage. En établissant un organisme indépendant pour ces fins, les lois du gouvernement fédéral et du gouvernement du Nouveau-Brunswick ont pour effet de soustraire les décisions quant à ces mécanismes de toute influence politique.

La négociation collective est un phénomène relativement récent pour les niveaux supérieurs de gouvernement. Ainsi le manque de négociateurs expérimentés, particulièrement du côté gouvernemental, a quelques fois présenté de sérieux problèmes à la table de négociation. Les négociations ont parfois été rendues difficiles du fait que les négociateurs gouvernementaux ne possédaient pas toujours un mandat suffisant pour effectuer un règlement, particulièrement sur les clauses pécuniaires. Le gouvernement serait bien avisé de déléguer une autorité suffisante à des négociateurs expérimentés, non seulement pour effectuer un règlement mais aussi, ce qui est également important, pour inspirer aux négociateurs syndicaux la confiance qu'ils ont le pouvoir de le faire. Ceci aurait pour effet de faire disparaître certaines frustrations qui sont survenues dans la négociation du secteur public dans le passé.

Alors que la tendance dans le secteur public au Canada est de réduire au minimum les délais de conciliation, sinon de les éliminer entièrement, le haut niveau d'intérêt public dans le règlement de différends dans les services publics, la nature essentielle de plusieurs de ces services et l'expérience limitée des parties quant à la négociation collective semblent être de bonnes raisons pour continuer et même prolonger les procédures de conciliation dans ce secteur.

Mais qu'arrive-t-il en cas d'échec des négociations après que tous les mécanismes disponibles pour en arriver à une solution négociée ont été épuisés ? Certaines juridictions imposent alors l'arbitrage obligatoire des différends non résolus et d'autres permettent le choix entre l'arbitrage et la grève. Deux suggestions majeures ont été faites pour rendre l'arbitrage plus acceptable aux syndicats. La première consiste à confier l'administration du mécanisme d'arbitrage à une commission indépendante sur le modèle déjà établi par la loi fédérale et celle du Nouveau-Brunswick. La deuxième consiste à élargir le champ des questions qui peuvent être soumises à l'arbitrage.

Le droit de grève demeure la question la plus litigeuse des relations de travail dans le secteur public et l'expérience tant canadienne qu'américaine démontre que des grèves peuvent et vont avoir lieu même si elles sont prohibées par la loi. Le problème de l'*applicabilité* des lois ne doit pas être oublié lorsqu'une loi est à l'étude. Alors qu'il peut être difficile ou même injuste de priver la majorité des employés des services publics du droit qui est accordé aux employés du secteur privé, le problème crucial auquel font face les législateurs est celui de la définition des « services essentiels » et la garantie que ces services seront maintenus. Même si des dispositions à cet effet existent déjà au Québec, au Nouveau-Brunswick et au niveau fédéral pour assurer le maintien des services essentiels en cas de grève légale, la violation de ces dispositions durant la grève du secteur public au Québec et également par les techniciens en électronique de la fonction publique fédérale démontre que les sanctions légales actuellement prévues pour la non-observance de ces dispositions ne constituent pas un obstacle lorsque les employés sont suffisamment déterminés à les enfreindre. En se fondant sur cette expérience, il serait peut-être nécessaire de renforcer les sanctions pour non-observance. De plus, l'État peut toujours recourir à des mesures législatives spécifiques appropriées aux circonstances particulières de chaque cas. Les représentants élus du peuple ont le pouvoir ultime et la responsabilité de réagir à toute menace au bien-être du public.